

**COMBAR SUBMISSION TO THE LETR IN RESPONSE
TO DISCUSSION PAPER 02/2012 (“KEY ISSUES II”)**

Introduction

1. This submission to the Legal Education and Training Review (“LETR”) is made by the Commercial Bar Association (“COMBAR”) in response to the LETR’s Discussion Paper 02/2012 “Key Issues II: Developing the Detail” (“DP 02/12”).
2. COMBAR is the Specialist Bar Association representing barristers in England and Wales who practise in the field of international and commercial law. Just over 1,300 barristers are members of COMBAR, comprising thirty-eight sets of chambers, mainly in London, from which barristers practise in this field, together with a number of individual self-employed and employed barristers. The great majority of practitioners at the Commercial Bar of England and Wales are members of COMBAR.
3. We should stress that the commercial bar is very much a specialist referral profession. Solicitors who instruct the commercial bar are, themselves predominantly sophisticated lawyers in their own right, and they do so because they seek specialist commercial law advice from our members which, it goes without saying, they expect to be informed by the most recent developments in the barrister’s chosen commercial specialism(s). Our members are also specialist advocates who typically appear before the most demanding judges, who again expect commercial barristers to

be well-prepared and up-to-date, and would not hesitate to say so if they thought this was not the case.

4. One very important aspect of COMBAR's work as the professional association which represents and supports this specialist part of the Bar is putting on a programme of regular lectures, seminars and other events to facilitate our members keeping abreast of developments relevant to their practices, and maintaining the skills for which the commercial bar is widely respected around the world. In addition to covering recent developments in specialist areas of commercial law, this programme also addresses other important matters such as advocacy skills and equality and diversity training. Where appropriate, COMBAR also collaborates in this regard with other specialist bar associations such as the Chancery Bar Association.
5. COMBAR did not submit a separate response of its own to the LETR's earlier Discussion Paper 01/2012 "Key Issues (1): Call for Evidence" ("DP 01/12"). It very much agreed, however, with the response to that paper submitted on behalf of the Council of the Inns of Court, and COMBAR has been keeping abreast of the work of the LETR.
6. The purpose of this submission is not to respond to all the specific questions posed in DP 02/12. COMBAR does not have a specific view of its own on many of the questions raised, and is content to allow broader representative bodies, such as the Bar Council, to respond more fully on behalf of the Bar as a whole. There is one particular aspect of DP 02/12, however, on which COMBAR does feel the need to respond, and that is what is said about continuing professional development. That need is all the more keenly felt because of the way in which certain questions bearing on this issue in the LETR's recent on-line survey were couched.

7. This submission will therefore briefly remind the LETR, by way of background, of what it has said to date on the issue of continuing professional development, and it will then go on explain COMBAR’s view.

Background

8. In DP 01/12, it was stated that CPD was widely acknowledged to be a problem area, and one which was “possibly” over-dependent on in-put measures (specified hours) and lacking in rigorous quality.¹ It was also said to be widely regarded as a box-ticking exercise, rather than as a means of ensuring that professionals are keeping abreast of developments in their field.² The question was then posed whether CPD was one area where there is a broad consensus for reform, and whether there was agreement on the need to move away from “input-driven” approaches.³ We do not know what the responses to the second part of that question were, but things have happened since then which lead us to be concerned that the LETR is minded to move towards an “outcomes-focussed” approach, possibly even requiring periodic assessment and accreditation of barristers’ competence.
9. In the first place, the LETR’s recent online survey posed a question bearing on this issue in a way which seemed to COMBAR to invite responses which risked being interpreted as support for periodic accreditation when this was not the intention of the responder. Question 5 asked respondents to rate – on a scale from “completely reliable” to “completely unreliable” – how reliable a number of things may be in ensuring the competence of legal professionals. In addition to matters

¹ DP 01/12, para. 48.

² DP 01/12, para 84.

³ DP 01/12, para. 98.

such as *“entry qualifications”*, and *“continuing professional development training”*, there were also included in the list *“accreditation schemes”*, and *“revalidation; regularly scheduled examinations or other tests to confirm that legal professionals are aware of recent developments in their field of practice, and remain capable of working to the expected standards.”* It seems to us that, even if responses conceded that regularly scheduled examinations, and the such like, could be a “reliable” way of ensuring competence, it plainly does not follow that they thought this was a necessary, desirable, or proportionate way of doing so. However, this fundamental supplementary question was not asked. We trust, therefore, that answers to this question will not be viewed as support for an “outcomes-focussed” approach, justifying periodic testing or the such like.

10. On a related matter, COMBAR also had particular concerns about Question 3 of the on-line survey. That question asked respondents to tick which descriptions of “competent” were considered descriptions of competent legal professionals, and gave as alternatives someone who has satisfied the regulations to become authorised *“regardless of subsequent performance”*, someone who is *“not so negligent or incompetent to merit sanction”*, and someone who has demonstrated *“a consistently high standard of performance over a period of time”*. Many of our members felt that none of these alternatives accurately described a competent legal professional; and that by limiting the options in this way (and not even giving a respondent the opportunity to say “none of the above”), the effect would be likely to be to push respondents into expressing agreement with a higher standard of “competence” than they actually believed to be the case.
11. The issue of CPD is briefly returned to in DP 02/12 where it is stated that *“the general view that something needs to be done about CPD was widely endorsed by respondents to Discussion Paper 01/2012”*, but that the LETR was

not proposing to address CPD further in any greater depth in that paper.⁴ It justifies not addressing further the question of *what* to do on the grounds that work is continuing by front-line regulators on their own CPD consultations, and so it would be inappropriate to cut across that work. It is also said that the issue of CPD is being addressed in the LETR's focus groups.

12. COMBAR is somewhat surprised by the failure of the LETR to deal further with CPD on the grounds that this is already being addressed by front-line regulators. It is true that there has been a wide-ranging recent review of CPD at the Bar conducted on behalf of the Bar Standards Board by a committee chaired by Sir Derek Wood CBE QC. However, as we understand it, the Bar Standards Board has put on hold giving any further consideration to whether, and if so how, to implement the recommendations of that committee, pending the LETR reporting on the outcome of its own review.
13. Furthermore, although DP 02/12 purports not to address the question of CPD in any greater depth on that ground, we note that there are indications elsewhere in the paper that the LETR does itself take the view that periodic re-evaluation of legal professionals for competence is the way forward. It is stated, for example, that *“data do suggest that we cannot assume that the current system, with its predominant focus on assuring competence to practise at an early stage of one’s career, with a relatively light touch approach to CPD and continuing accreditation is capable of delivering competent service across the piece”*.⁵ Later, it is said that one of the *“key issues”* for the LETR’s review is that *“[t]here is too great a reliance on initial training as a guarantor of generalist or broad-based competence. The risks to consumers created by increased segmentation of the*

⁴ DP 02/12, para. 21.

⁵ DP 02/12, para. 103.

*market and growing specialisation are not sufficiently addressed by regimes that place the onus on what we will define as “passive” competence weighted towards training undertaken at the earlier stages of a career”.*⁶

The present system of CPD

14. It is against this background that COMBAR considers that it should briefly explain its view on the present system of continuing professional development, and express its objection to any move towards a more active and “outcomes-focussed” system (especially in the form of periodic testing or examination) if that is what the LETR is minded to recommend.
15. Like many other respondents to the LETR’s DP 01/12, COMBAR agrees that the present system of CPD at the Bar is unsatisfactory. However, this is not because there is something inherently unsatisfactory about a system which requires a specified number of hours per year to be spent on updating a barristers’ legal knowledge and other skills relevant to his or her practice. On the contrary, our experience of COMBAR’s own continuing education programme, and the way in which it is received by our members, is that it is a rigorous one, and affords commercial practitioners a reliable way of remaining competently up-to-date in their chosen area(s) of practice. It is far from being the “box-ticking” exercise portrayed in DP 01/12. Plainly, the fact that some CPD activities may make little contribution to a barristers’ continuing competence does not mean that all such activities suffer from the same problem.
16. Moreover, quite aside from COMBAR’s own continuing education programme, our experience is that commercial practitioners have many other ways of keeping up-to-date, including for the purposes of giving

⁶ DP 02/12, para. 227(b).

lectures or seminars to solicitors firms and/or in-house counsel, and by writing articles and giving papers at conferences. In all these instances, continuous professional development positively goes hand in hand with practice development.

17. In our experience, if there is a criticism to be made of the Bar's present CPD system it is that too few activities can presently count towards a barrister's continuing professional development. It seems to us absurd, for example that no amount of time spent on keeping up-to-date by reading daily digests of recent cases (such as is provided by Lawtel's service) can count towards a barrister's continuing professional development, but being told about one or more recent cases at a lecture can. The solution to this, however, is a better fine-tuning of the activities which can count for CPD purposes, as indeed the committee chaired by Sir Derek Wood CBE QC has already recommended. It does not point towards the need for any kind of "outcomes-focussed" reform.
18. The other point which COMBAR would emphasise is a consideration which the LETR itself recognises in DP 02/12, namely that issues of potential concern which the LETR has identified do not arise equally in respect of all regulated occupations, or even parts of the same occupation.⁷ As we have already pointed out in paragraph 3 above, our members practise their skills in front of a highly sophisticated audience of legal consumers. Not only will the sort of client who makes use of the commercial bar typically be a sophisticated business person in his or own right, but that lay client will also usually be represented by one or more highly-trained lawyers working in the firm of solicitors who directly instructs the barrister. When appearing in court, our members will also typically be presenting cases before the most demanding of judges in the

⁷ DP 02/12, para. 127.

presence of their instructing solicitors. All this provides the strongest of incentives for commercial barristers to ensure that they remain able to perform competently throughout their professional careers, as well as a ruthless filter for anyone who did not.

Conclusion

19. For the above reasons, therefore, we urge the LETR to resist allowing a (legitimate) perception that the present system of continuing professional development at the Bar needs some change lead to the (illegitimate) conclusion that only an “outcomes-focussed” approach will do. We accept that change to the present system is justified, and we generally endorse the recommendations of the Wood review in this regard. However, any suggestion that the only way barristers can be relied upon to be competent is to subject them to periodic examination, testing, or the such like is, in our view, misconceived.
20. We know of no body of evidence which suggests that there is a problem on this front which only an “outcomes-focussed” approach could deal with; still less that it would be a proportionate solution to the problem if it existed. We believe this is generally true of the bar as a whole, but we believe it is beyond doubt in the particular case of the commercial bar.

22 October 2012